86-405

No. _____

Supreme Court, U.S.
FILED
SEP 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HAMID R. KASHANI, *Petitioner*,

v.

ALAN C. NELSON, Commissioner of the Immigration and Naturalization Service, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September 10, 1986

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QUESTIONS PRESENTED

1. Does a district court have jurisdiction to review an Immigration and Naturalization Service (INS) district director's denial of an alien's asylum application, where the denial is made outside of a deportation proceeding and, thus, the denial would never be directly reviewable in any subsequent proceedings before a court of appeals?

2. Does the Political Question Doctrine bar judicial review of an INS district director's denial of an alien's asylum application?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Hamid R. Kashani, and the Honorable Alan C. Nelson, the Commissioner of the Immigration and Naturalization Service.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Hamid R. Kashani, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case, on June 12, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 793 F.2d 818. It is reprinted in the Appendix hereto, p. 1a, *infra*. The judgment of the Court of Appeals is reprinted in the Appendix, p. 24a, *infra*.

The memorandum decision of the United States District Court for the Southern District of Indiana has not been reported. It is reprinted in the Appendix, p. 21a, *infra*.

JURISDICTION

The order of the United States District Court for the Southern District of Indiana, dismissing Kashani's complaint, was entered on September 11, 1984. Defendant is an officer of the United States sued in his official capacity. The Notice of Appeal to the United States Court of Appeals for the Seventh Circuit was timely filed on November 9, 1984. Fed. R. App. P. 4(a). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

The judgment and opinion of the Court of Appeals was entered on June 12, 1986. No rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following statutes and regulations are relevant to the determination of this case: 28 U.S.C. §1331; Immigration and Nationality Act §§106(a), 208(a), & 279, 8 U.S.C. §§1105a(a), 1158(a), & 1329 (1982); 8 C.F.R. §§208.1 & .8(a)-(c) (1986).

The texts of these authorities are set out in the Appendix hereto, p. 1b, *infra*.

STATEMENT OF THE CASE

Petitioner, Hamid R. Kashani, an Iranian, first entered the United States on January 4, 1976, pursuant to a valid visa to study at Purdue University School of Electrical Engineering. 793 F.2d at 819. Kashani "visited his homeland twice prior to the Islamic revolution, last returning to the United States on August 26, 1978." District Court's Order at 1.

On October 14, 1982, Kashani filed an asylum application with the INS district director who denied it on October 20, 1983. 793 F.2d at 819. In November 1983, Kashani filed a complaint for judicial review of the district director's determination, with the United States District Court for the Southern District of Indiana "alleging that the District Director abused her discretion in denying his asylum request and that she failed to consider relevant evidence and based her decision on non-relevant grounds." *Id.*

On September 11, 1984, the District Court dismissed Kashani's complaint, holding that "[a]n applicant for asylum does not have the right to appeal the district Director's decision in the district court." District Court's Order at 2. For this proposition, the District Court cited to 8 C.F.R. §208.8(c) which prescribes that no administrative appeal shall lie from a district director's denial of asylum. District Court's Order at 2.

Kashani appealed to the United States Court of Appeals for the Seventh Circuit which, on June 12, 1986, affirmed. The Court of Appeals held that the district courts lack jurisdiction for review of district directors' asylum decisions, 793 F.2d at 823, and that an alien

whose asylum claim is denied by a district director may not seek district court review because he has not exhausted his administrative remedies. *Id.* at 826-27. Finally, the Seventh Circuit held that judicial review of the district directors' asylum determinations is barred by the Doctrine of Political Question. *Id.* at 827-28.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit's holding that a district court lacks jurisdiction to review an INS district director's asylum decision conflicts with the prior decisions of this Court.

In *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), this court held that a district court has jurisdiction to review an INS district director's decision made outside of a deportation proceeding. *Id.* at 210. And, in *INS v. Stanisic*, 395 U.S. 62 (1969), *reh'g denied*, 395 U.S. 987 (1969), this Court further emphasized: "Because the District Director's [asylum] determination was not pursuant to §242(b) [deportation proceedings], the District Court had jurisdiction to review his action." *Id.* at 68 n.6. Nonetheless, the Seventh Circuit, below, held that a district court does not have jurisdiction to review an INS district director's asylum determination. 793 F.2d at 821-23. The holding of the Seventh Circuit directly conflicts with the prior decisions of this Court.

This case involves an asylum application made to and decided by a district director outside of a deportation proceeding. Deportation proceedings are conducted, before an immigration judge, under the Immigration and Nationality Act §242(b), 8 U.S.C. §1252(b) (1982) [hereinafter cited as INA]. The decisions of immigration judges are appealable to the Board of Immigration Appeals (BIA). 8 C.F.R. §242.21 (1986). And, the BIA's final orders are directly reviewable by a court of appeals in proceedings under the INA §106(a), 8 U.S.C. §1105a(a) (1982).

Asylum decisions by the district directors are made outside of §242(b) deportation proceedings. In fact, once a deportation proceeding is commenced, the alien may no longer file an asylum application with a district director. 8 C.F.R. §208.1 (1982-86). Thus, a district director's asylum decision is not reviewable by a court of appeals in a §106(a) judicial review proceeding, because it is a determination

made outside of a deportation proceeding. *Carvajal-Munoz v. INS*, 743 F.2d 562, 566-67 (7th Cir. 1984).

In *Cheng Fan Kwok*, the alien applied to the district director for a stay of deportation and classification as a refugee. 395 U.S. at 207-208 & n.5. The district director denied his request. The alien petitioned the Third Circuit, under the INA §106(a), for judicial review of the district director's decision. The Third Circuit declined review. This Court affirmed, holding that a court of appeals lacks jurisdiction to directly review a district director's decision, because such a decision is not made during a deportation proceeding and, thus, the provisions of §106(a) are not applicable to it. *Id.* at 216. "In situations to which the provisions of §106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210. The opinion of the Seventh Circuit, below, made no references whatsoever to this portion of *Cheng Fan Kwok*, nor to this Court's opinion in *Stanisic*.

In declining to allow the district court to exercise jurisdiction over Kashani's case, the Seventh Circuit also held that Kashani has not exhausted his administrative remedies. 793 F.2d at 826-27. But, the INS regulations provide that no administrative "appeal shall lie from the decision of the district director." 8 C.F.R. §208.8(c) (1986). "It is tautological that the exhaustion doctrine does not preclude the exercise of jurisdiction when there are no further administrative remedies to pursue." *Haitian Refugee Center (H.R.C.) v. Smith*, 676 F.2d 1023, 1035 (5th Cir. 1982).

An alien whose asylum application is denied by the district director may renew his application before an immigration judge in a subsequent deportation proceeding. 8 C.F.R. §208.9. However, there are substantial differences in the remedies available to an alien pursuant to the grant of asylum by a district director as compared to the remedies available after an immigration judge grants such relief. The most important difference is the delay in the alien's eligibility date for U.S. citizenship.[1] American citizenship is "one of the most

[1] When the district director approves an asylum application, "asylum status will be granted for one year." 8 C.F.R. §208.8(e) (1986). After one year, the alien may apply for adjustment of status. *Id.* at §208.8(e)(1). If the application is granted, then the alien's date of admission for permanent residence will be recorded as of a year prior to the date of approval. INS Operating Instruction §209.5a(a) (1986). An alien who has been a permanent resident for five years is eligible for citizenship. INA §316(a), 8 U.S.C. §1427(a) (1982).

(Footnote continued on following page)

valuable rights in the world today." *Report of the President's Comm'n on Immigration and Naturalization* 235 (1953), *quoted with approval in Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). An alien "would suffer significant collateral detriment should . . . [he] be required to wait longer in order to be eligible for citizenship status . . . . By this difference in dates when permanent resident status is granted, [the alien] thus retains a personal interest" in litigating against the source of such delay. *Chadha v. INS*, 634 F.2d 408, 417 n.6 (9th Cir. 1980), *aff'd*, 462 U.S. 919, 937 n.10 (1983) (citations omitted). *See also* Solicitor General's Jurisdictional Statement at 7 n.6, *INS v. Chadha*, 462 U.S. 919 (1983).

Notably, the collateral injury suffered by the alien as a result of the district director's denial cannot be cured in the separate proceeding before an immigration judge. Under the INS regulations, neither the immigration judge nor the BIA have any authority to review separate orders of the district directors. *H.R.C.*, 676 F.2d at 1035; *Matter of Rios-Carrillo*, 10 I.N. Dec. 291, 296 (BIA 1963).

The Seventh Circuit further rested its decision, below, on the legislative history of §106(a), but its construction of the congressional intent conflicts with the findings of this Court in *Cheng Fan Kwok*. The Seventh Circuit emphasized that in enacting section 106(a), Congress intended to provide for an exclusive procedure for review of "final orders of deportation" and to reduce dilatory tactics by aliens. 793 F.2d at 824. The Seventh Circuit then concluded that allowing the district courts to review the district directors' asylum determinations would delay deportation proceedings. *Id.* But, the Attorney General has vast authority to define the scope of deportation proceedings, and "a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Courts of Appeals" in §106(a) proceedings. *Foti v. INS*, 375 U.S. 217, 229-30 (1963). The Attorney General has exercised his authority to formulate a regulatory scheme which in effect results in the necessity of having a bifurcated judicial review, in different forums, of different immigation decisions. In *Cheng Fan Kwok*, this Court foresaw this situation:

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[1] *continued*

By contrast, if the district director denies the alien's asylum application and initiates a deportation proceeding against him, then the alien would not have an opportunity to renew his asylum application until a later date. Therefore, even assuming that the immigration judge would grant asylum, there would be a substantial delay in the alien's eligibility date for U.S. citizenship.

> The result we reach today will doubtless mean that, on occasion, the review of denials of discretionary relief will be conducted separately from the review of an order of deportation involving the same alien. Nonetheless, this does not seem an onerous burden, nor is it one that cannot be avoided, at least in large part, by appropriate action of the Immigration Service itself.

392 U.S. at 217.

The Seventh Circuit further rested its decision, below, on its finding that in enacting the Refugee Act of 1980, Congress has not specifically provided for judicial review of the district directors' asylum determinations. 793 F.2d at 825. But "[t]he mere failure to provide specially, by statute for judicial review is certainly no evidence of intent to withhold review." *Administrative Proc. Act*, H. Rep. No. 1980, 79th Cong., 2d Sess. 41, *reprinted in* 1946 U.S. Code Cong. & Ad. News 1195, *quoted with approval in Abbott Labs. v. Gardner*, 387 U.S. 136, 140 n.2 (1967). *See also Barlow v. Collins*, 397 U.S. 159, 166 (1970) (Reviewability is presumed.).

In both *Stanisic* and *Cheng Fan Kwok*, this Court upheld an exercise of district court jurisdiction in spite of an absence of explicit congressional authorization. In *Stanisic*, this Court held the district court did have jurisdiction to review the district director's decision on a claim of political persecution, precisely the issue in the present case. Since the Refugee Act of 1980 is silent on the question of district court jurisdiction, it cannot be said that the Act implicitly overruled *Stanisic* on this issue.

The Seventh Circuit, below, further stated that it "hasten[s]" to hold that the Political Question Doctrine bars judicial review of the district directors' asylum decisions made under the Refugee Act of 1980. 793 F.2d 818. The Refugee Act of 1980 was enacted, in part, to implement the provisions of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577. "The President and the Senate believed that the Protocol was largely consistent with existing [pre-Act] law." *INS v. Stevic*, 467 U.S. 407, 417 (1984). And, in fact, the Refugee Act of 1980 made "no substantial change in the laws and practice of the United States." 1 C. Gordon and E. Rosenfield, *Immigration Law and Proc.* §2.3i, at 2-33 (Rev. ed. 1986). *See also Kashani*, 793 F.2d at 825 (The regulations "in effect at the time the Refugee Act was enacted [were] substantially the same as the present [new] scheme."). Thus, it cannot

be said that the enactment of the Refugee Act of 1980 requires that the decisions of this Court in *Cheng Fan Kwok* and *Stanisic* be reversed.

Notably, the Senate Report declares that the Refugee Act of 1980 "repeals the current immigration law's discriminatory treatment of refugees by providing a new definition of a refugee that recognizes the plight of homeless people all over the world." *Refugee Act of 1980*, S. Rep. No. 96-256, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Ad. News 141, 142. Thus, in enacting the Refugee Act, Congress intended to free aliens from the past discriminatory practice, and it cannot be said that at the same time Congress intended to deprive aliens from the right to judicial review which was previously available to them under *Cheng Fan Kwok* and *Stanisic*.

In holding the Political Question Doctrine applicable in the instant case, the Seventh Circuit quoted from and discussed, at length, the provisions of the Refugee Act relating to the "refugees." 793 F.2d at 828. The refugee status is determined under the INA §207(b), 8 U.S.C. §1157(b). It has nothing to do with an asylum application which is decided under the INA §208(a), 8 U.S.C. §1158(a). Refugees are applicants for admission to the United States, and some courts have held that an alien may not seek judicial review of a denial of admission visa. *See, e.g., Loza-Bedoya v. INS*, 410 F.2d 343, 347 (9th Cir. 1969). The situation with the asylees is fundamentally different. Asylum applications are made by aliens already "physically present in the United States." INA §208(a), 8 U.S.C. §1158(a).

A district director decides an asylum application in exercise of her discretion. INA §208(a), 8 U.S.C. §1158(a); 8 C.F.R. §208.8(a) (1986). Thus, judicial review is necessary to ensure that the decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(a)(A) (1982), and to determine "whether the decision was based on a consideration of relevant factors." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 406, 416 (1971). Further, the Seventh Circuit, as well as many other circuits, have long reviewed the asylum decisions of the immigration judges. *See, e.g., Carvajal-Munoz*, 743 F.2d 562; *Fleurinor*, 585 F.2d 129. Therefore, it does not follow that judicial review should be barred, under the Political Question Doctrine, when the same question is decided by the district directors. After all, the immigration judges, as well as the district directors, make their decisions pursuant to the same statute, INA §208(a), 8 U.S.C. §1158(a).

II.

The Seventh Circuit's decision, below, conflicts with the holdings of several other circuits which have held that a district court has jurisdiction to review an INS district director's denial of asylum.

1. **The Tenth Circuit.** In *Salehi v. District Director, INS*, No. 84-1006, *slip op.* (10th Cir. July 16, 1986) (available Aug. 27, 1986, on LEXIS, Genfed library, Usapp file; on WESTLAW, Cta library) (to be reported at 796 F.2d 1286), three Iranian aliens filed their complaints in the district court for judicial review of the district director's asylum decisions. Their claims were "based on the criteria and procedure for obtaining asylum." *Id.* at 11 (video page on LEXIS). The district court dismissed for lack of subject-matter jurisdiction. The Tenth Circuit reversed. The holding of the Tenth Circuit is reproduced here, because it reveals a direct conflict with the Seventh Circuit and because it shows that the Tenth Circuit relied on a number of cases which the Seventh Circuit has ruled to be irrelevant:

> We conclude that petitioners' claims based on the [Refugee Act, the Protocol [Relating to the Status of Refugees], and the Constitution are not direct attacks on their deportation orders. Accordingly, exclusive jurisdiction is not in this court, and the claims were therefore properly brought in the district court. *Accord Chadha*, 462 U.S. at 938-39; *Cheng Fan Kwok*, 392 U.S. at 212-14; *Sadegh-Nobari v. INS*, 676 F.2d 1348, 1350 (10th Cir. 1982). That court [i.e. the district court] has jurisdiction under section 279 of the Act [INA], and 28 U.S.C. §1331 (1982) (federal question), *see Jean v. Nelson*, 727 F.2d 957, 980 n.32 (11th Cir. 1984) (en banc) (district court jurisdiction under 28 U.S.C. §1331 over Refugee Act of 1980 claim), *aff'd*, 105 S. Ct. 2992 (1985); *Haitian Refugee Center v. Smith*, 676 F.2d at 1033 & n.22; *Haitian Refugee Center v. Civiletti*, 503 F. Supp. at 461; . . . .

Salehi, 796 F.2d at ___, *slip op.* at 14 (video page on LEXIS)

2. **The Second Circuit.** In *Yiu Sing Chun v. Sava, District Director, INS*, 708 F.2d 869 (2d Cir. 1983), two stowaway aliens sought asylum before a district director who denied their applications. They then sought an exclusion hearing, before an immigration judge, in

order to renew their asylum applications. That opportunity was denied by the INS. The aliens sued in the district court.

> After holding that the INS District Directors had not abused their discretion in denying [the aliens] asylum status under the Refugee Act of 1980, 8 U.S.C. §§1158(a), 1101(a)(42)(A), the [district court] held that they were not entitled to an exclusion hearing because they were stowaways and, as such, denied procedural rights by 8 U.S.C. §1323(d). We reverse the second holding and remand . . . .

Id. at 869-70 (footnotes omitted). Thus, the Second Circuit not only held that stowaways are entitled to an exclusion hearing for renewing their asylum applications, but also allowed the district court to assume jurisdiction over the district director's asylum decisions, even though the district court held for the district director on the merits.

3. **The Ninth Circuit.** The Ninth Circuit has long held that a district court has jurisdiction for judicial review of a district director's asylum determination. *See, e.g., Medina v. Castillo*, 627 F.2d 972, 975 (9th Cir. 1980), *Stanisic v. United States INS*, 393 F.2d 539, 542 (9th Cir. 1968), *rev'd on other grounds*, 395 U.S. 62, 68 n.6 (1969), *reh'g denied*, 395 U.S. 987 (1969).

In *Stanisic*, the plaintiff, an excludable alien, appealed to the district director for asylum. The district director denied his application. Stanisic sued in the district court which held for the district director, on the merits. *Vucinic and Stanisic v. INS*, 243 F. Supp. 113 (D. Ore. 1965). Later, Stanisic filed a second asylum application with the district director who denied it. 393 F.2d at 541. Stanisic again sued in the district court. District courts have jurisdiction, under the INA §106(b), 8 U.S.C. §1105a(b), to review "final orders of exclusion." However, Stanisic additionally sought the judicial review of the district director's asylum determination. The district court held for the district director, on the merits. Stanisic appealed. The Ninth Circuit held that the district court's jurisdiction was not limited to the review of the final order of exclusion and that it extended to judicial review of the district director's denial of asylum, because the district director's decision was made outside of a deportation proceeding. *Id.* at 542. The Supreme Court agreed. *Stanisic*, 395 U.S. at 68 n.6.

In *Medina*, the alien brought an action in the district court challenging the district director's consideration of his asylum application.

Later, the parties made a joint stipulation providing that "Medina would withdraw his motion for a preliminary injunction; that the INS denial of asylum would be withdrawn; that both parties would request a continuance of Medina's deportation hearing; . . . ." 627 F.2d at 974. The district court dismissed the entire case for failure to exhaust administrative remedies. *Id.* The Ninth Circuit vacated and remanded, holding that the district court has jurisdiction to review the district director's decision and that it should have retained jurisdiction over the case until it was finally settled. *Id.* at 975.

4. **The Fifth Circuit.** In *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978), during a §106(a) proceeding before the Court of Appeals, the alien sought judicial review of the district director's earlier denial of his asylum application. The Fifth Circuit held that it cannot directly review a district director's asylum decision which is made outside of a deportation proceeding, and that the alien's remedies lie first in an action brought in an appropriate district court. *Id.* at 135-36 & n.6. *See also Luciano-Vincente v. INS*, 786 F.2d 706, 709 (5th Cir. 1986).

In *Haitian Refugee Center (H.R.C.) v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom. H.R.C. v. Smith*, 676 F.2d 1023 (5th Cir. 1982), plaintiffs against whom deportation proceedings were pending brought a class action against a number of INS officials. Their complaint contained 16 counts. Counts 1-3 alleged unlawful "pattern and practice" on the part of the immigration judges during their deportation proceedings. 503 F. Supp. at 467. And, Counts 4-16 asserted unlawful conduct on the part of the district director in considering asylum claims. *Id.*

In *H.R.C.*, the INS did not contest the district court's general jurisdiction over the aliens' claims against the district director. *Id.* at 457. *See also* 676 F.2d at 1032 (Part II). The INS objected to the district court's jurisdiction over the aliens' claims against the immigration judges (Counts 1-3). 503 F. Supp. at 457. Such claims are ordinarily within the jurisdiction of the Courts of Appeals. INA §106(a), 8 U.S.C. §1105a(a). The *H.R.C.* Court, however, held that a district court has jurisdiction to review immigration judges' actions where the plaintiffs have alleged an unlawful "pattern and practice." 676 F.2d at 1033.

In his briefs filed in the Seventh Circuit, Kashani partly relied on *H.R.C.* (Counts 4-16) for the proposition that a district court has jurisdiction to review a district director's asylum decision. The Seventh Circuit disapproved of Kashani's reliance on *H.R.C.* The

Seventh Circuit extensively quoted from that portion of *H.R.C.* which deals with the exceptional circumstances regarding Counts 1-3. *See, e.g.*, 793 F.2d at 823 (1st sentence of 1st full paragraph, left col.). The Seventh Circuit then held that *H.R.C.* is inapplicable to Kashani's case, because the exceptional circumstances present in *H.R.C.* were not present in Kashani's case. *Id.* But, Counts 1-3 in *H.R.C.* deal with "pattern and practice" of immigration judges; they have nothing to do with the case at bar. Kashani, however, has sought only to invoke the district court's jurisdiction over the district director's action. In fact, the district court in *H.R.C.* stated: "Clearly, however, the District Director's denial of an asylum claim is a final order for which appeal lies solely in the district court." 503 F. Supp. at 469 n.2 (citing *Fleurinor*, 585 F.2d at 134-36); 676 F.2d at 1033 & n.22. Most recently, the Tenth Circuit in *Salehi* cited *H.R.C.* for the proposition that a district court has jurisdiction over the individual aliens' asylum claims against the district directors. *See Salehi*, 796 F.2d at_____, *slip op.* at 14 (video page on LEXIS).

In *H.R.C.*, the district director claimed that because plaintiffs could renew their asylum applications before an immigration judge during a deportation proceeding, therefore they had not exhausted their administrative remedies and Counts 4-16 should be dismissed. The district court held that the district director's exhaustion defense was frivolous. 503 F. Supp. at 467. The Fifth Circuit affirmed. 676 F.2d at 1035.

> Under INS regulations, "no appeal shall lie" from the District Director's decision on asylum applications. Hence, with respect to the decisions of the District Director, there exist no more administrative remedies for the plaintiffs to pursue and the plaintiffs have exhausted their administrative remedies on causes of action 4-16.

503 F. Supp. at 467. "It is tautological that the exhaustion doctrine does not preclude the exercise of jurisdiction when there are no further administrative remedies to pursue." 676 F.2d at 1035.

5. **The Eleventh Circuit.** *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982) (commonly referred to as *Louis II*), *rev'd in part, aff'd in part sub nom. Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983), *as modified*, 727 F.2d 957 (1984) (en banc), reh'g en banc denied, 733 F.2d 908 (1984), *aff'd*.____ U.S.____, 105 S. Ct. 2992 (1985), was similar to *H.R.C.*

In *Jean*, plaintiffs brought an action in the district court complaining of the allegedly unlawful conduct of the district director and immigration judges. Kashani's brief cited those parts of *Jean* dealing with the district court's jurisdiction over the asylum claims of the aliens against the district director. The Seventh Circuit, referring only to those parts of *Jean* which dealt with the exceptional circumstances warranting a district court's jurisdiction over the actions of the immigration judges, again held Kashani's reliance irrelevant. *See* 793 F.2d at 823 (citing *Jean*, 727 F.2d at 980). *But see* 727 F.2d at 980 n.32. Notably, the Tenth Circuit, in *Salehi*, cited *Jean* for the proposition that a district court has jurisdiction to hear aliens' asylum claims against a district director. *See Salehi*, 796 F.2d at_____, *slip op.* at 14 (video page on LEXIS).

In *Jean*, the claim against the district director was whether he has an affirmative duty to inform the aliens of their rights to file asylum applications. Eventually, the Eleventh Circuit held: "We therefore conclude that although aliens have a protected statutory and regulatory right to petition for asylum [before the district director, 727 F.2d at 981-83], neither the Constitution nor the Refugee Act and its accompanying regulations require the INS to inform all potential applicants of their right to seek asylum." 727 F.2d at 983. However, before reaching the issue the Eleventh Circuit had to determine whether a district court has jurisdiction over the actions of the district director. In *Louis II*, the district court had held that the aliens could not challenge the actions of the district director regarding their asylum applications because they allegedly had not exhausted their administrative remedies; the district court concluded, as did the Seventh Circuit below, that aliens must first submit themselves to a deportation hearing. 532 F. Supp. at 885-88. Although the *Louis II* Court correctly noted that administrative remedies must be exhausted prior to judicial review, it totally ignored the fact that an alien whose asylum application is denied by the district director has no further administrative remedies to exhaust — and that is why it was reversed. "We disagree that the harm alleged in the asylum claim [before the district director] may be cured in subsequent proceedings." 711 F.2d at 1506. "The existence of unexhausted administrative remedies . . . applicable to an alien's opportunity to apply for asylum before the immigration judge therefore cannot justify invoking the exhaustion doctrine with respect to a challenge to procedure before the district director." 727 F.2d at 981 (citing *H.R.C.*, 676 F.2d at 1035-36).

The Seventh Circuit, below, upheld the defendant's exhaustion defense and affirmed the dismissal of Kashani's complaint. 793 F.2d at 826-27. The Seventh Circuit extensively quoted from *McKart v. United States*, 395 U.S. 185, 194-95 (1969), for the proposition that a plaintiff must exhaust his administrative remedies before suing in a district court. 793 F.2d at 825-26. Kashani has never contested this proposition, *per se*. But, as the Courts in *H.R.C.* and *Jean* held, there are no administrative appeals from the asylum decision of a district director, 8 C.F.R. §208.8(c), and, thus, an alien whose asylum application is denied by a district director has no further administrative remedies to pursue in that regard. The holding of the Seventh Circuit, below, is in conflict with the decisions of the Second, Fifth, Ninth, Tenth, and Eleventh Circuits.

III.

This petition presents the important question of whether the district courts have jurisdiction to review district directors' decisions which are not otherwise reviewable by the Courts of Appeals during §106(a) proceedings.

There are about 60 different classes (with some overlaps) of "deportable aliens" who generally become deportable because of an act of their own — e.g. engaging in narcotic business, carrying certain firearms.[2] However, there is a *sub-class* of aliens who become deportable as a result of the district directors' actions. If an alien applies for an extension of his stay and the district director denies his request, the alien will be given a few days to voluntarily leave the United States; there will be no administrative appeals from this decision. If the alien does not voluntarily leave the United States, the INS will hold and deem him to be an "illegal alien" in violation of the INA §241(a)(2), 8 U.S.C. §1251(a)(2) (1982). During the deportation hearing, and with respect to the question of deportability, all that the alien will be allowed to plead is whether or not the district director has denied his application. The alien will not be allowed to challenge the underlying fact findings and the decision of the district director, because neither the immigration judges nor the BIA have any authority

[2] In total, 60 categories of aliens may be found "deportable." *See* INA §241(a) & (c), 8 U.S.C. §1251(a) & (c) (1982) (referring to INA §212, 8 U.S.C. §1182 (1982)).

to hear challenges to the decisions of the district directors. *Matter of Halabi*, 15 I.N. Dec. 105 (BIA 1974); *Matter of Geronimo*, 13 I.N. Dec. 680 (BIA 1971). *See also Kavasji v. INS*, 675 F.2d 236, 237 & n.2 (7th Cir. 1982).

Since this Court decided *Cheng Fan Kwok*, many aliens have tried to seek judicial review of a district director's decision during a §106(a) proceeding. But, the Courts of Appeals have invariably held that during a §106(a) proceeding they lack jurisdiction to directly review a district director's decisions because such decisions are not made in the course of a deportation proceeding.[3] At times, the Courts of Appeals have pointed out that the aliens' remedies lie in actions first brought in district courts.[4]

The INA vests the Attorney General with substantial regulatory power for formulating what claims the aliens may pursue in deportation proceedings and, thus, what decisions a court of appeals can directly review during a section 106(a) proceeding. *Foti*, 375 U.S. at 229-30. The Attorney General has decided to place the decisions of the district directors outside of deportation proceedings. The reason

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[3] *See e.g., Carvajal-Munoz v. INS*, 743 F.2d 562, 566-67 (7th Cir. 1984); *Fatehi v. INS*, 729 F.2d 1086 (6th Cir. 1984) (per curiam) (district director's denial of application for extension of stay, application for reinstatement of student status, and motion for stay of deportation); *Wall v. INS*, 722 F.2d 1442, 1443 (9th Cir. 1984) (district director's denial of deferred action status); *Ghaelian v. INS*, 717 F.2d 950, 952 (6th Cir. 1983) (district director's refusal to reinstate alien's student status); *Shoaee v. INS*, 704 F.2d 1079, 1082 (9th Cir. 1983) (district director's denial of reinstatement to student status and extension of stay); *Torabpour v. INS*, 694 F.2d 1119, 1121 (8th Cir. 1982) (district director's denial of extension of stay as a student); *Shoja v. INS*, 679 F.2d 447, 448-449 (5th Cir. 1982) (district director's denial of application for school transfer); *Sadegh-Nobari v. INS*, 676 F.2d 1348, 1350 (10th Cir., 1982) (district director's denial of change of status from a visitor to a student); *Kavasji v. INS*, 675 F.2d 236, 239 (7th Cir. 1982) (per curiam) (district director's denial of school transfer and extension of stay as a student); *Pang Kiu Fung v. INS*, 663 F.2d 417, 419 (2d Cir. 1981) (per curiam) (district director's denial of motion to stay deportation); *Oum v. INS*, 613 F.2d 51, 54 (4th Cir. 1980) (district director's denial of motion to stay deportation); *Lad v. INS*, 539 F.2d 808, 809 (1st Cir. 1976) (district director's denial of extension of time for voluntary departure); *Butterfield v. INS*, 409 F.2d 170, 173 (D.C. Cir. 1969) (district director's denial of a third preference petition).

[4] *Fatehi*, 729 F.2d at 1088; *Sadegh-Nobari*, 676 F.2d at 1350; *Kavasji*, 675 F.2d at 239; *Daneshvar v. Chauvin*, 644 F.2d 1248, 1249-50 (8th Cir. 1981); *Lad*, 539 F.2d at 80 n.4; *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) (Friendly, J.); *Shoja*, 679 F.2d at 449; *Lai Haw Wong v. INS*, 474 F.2d 739, 742 (9th Cir. 1973); *Butterfield*, 409 F.2d at 174.

is clear: A district director can turn an alien, who is otherwise lawfully in this country, into an illegal alien by his decision. When the alien is haled to a deportation proceeding, he would not be allowed to challenge the district director's decision. The validity of that decision is taken at its face value. This procedure allows the INS to swiftly ascertain a final order of deportation against the alien.

Deportability is conceded in eighty percent (80%) of the cases. *Foti*, 375 U.S. at 227 n.13 (citing 2 C. Gordon & E. Rosenfield, *Immigration Law and Proc.* § 5.7a, at 541 (1962)). This is not so because the aliens agree that they are deportable, but because they are unable to challenge the underlying decisions of the district directors which have rendered them deportable. This conclusion is evident from the sheer volume of section 106(a) cases in which the aliens have unsuccessfully tried to persuade the Courts of Appeals to review the decisions of the district directors. The Courts of Appeals, holding that they do not have jurisdiction for direct review, have referred the aliens to the district courts. Practically, however, it would be too late in time for the alien to go a district court to pursue a claim against the district director. By that time, the INS has secured a final order of deportation against the alien and enforcement is underway.

The bifurcated jurisdiction needed to review both a prior decision of a district director and a final order of deportation is necessiated by the Attorney General's own regulations which do not allow the immigration judges to review the district directors' decisions. The Attorney General has broad discretion to reformulate his regulations. 375 U.S. at 229-30. In fact, there is no reason why an immigration judge, who has been delegated the authority to decide the fate of an alien, should not be entrusted with the authority to review the decisions of the district directors. However, it is not for the courts to require the Attorney General to formulate a particular regulatory scheme. Thus, so long as the Attorney General's regulations place the decisions of the district directors outside of deportation proceedings, the aliens should be allowed to challenge those decisions in an appropriate district court.

IV.

The decision of the Seventh Circuit panel, below, conflicts with the decisions of the other panels of the Seventh Circuit holding that district courts have jurisdiction to review district directors' decisions.

In *Kavasji v. INS*, 675 F.2d 236 (7th Cir. 1982) (per curiam), the alien sought judicial review of a prior order of the district director denying him school transfer. *Id.* at 237. The Seventh Circuit held that, during a §106(a) proceeding, a court of appeals does not have jurisdiction to directly review the decision of immigration judges. *Id.* at 239. The Court concluded: "In short, Kavasji's challenge to the actions of the district director properly belongs in the district court." *Id.*

In *Navarro v. District Director of INS*, 574 F.2d 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 861 (1978), plaintiff originally sued in the district court, seeking judicial review of the district director's denial of her "third preference petition" and "adjustment of status application." The district court dismissed for lack of subject-matter jurisdiction. The Seventh Circuit reversed as to jurisdiction:

> We are of opinion that the Declaratory Judgment Act, 28 U.S.C. §2201, furnishes a basis for [plaintiff's] invocation of federal question jurisdiction, 28 U.S.C. §1331(a) [now 28 U.S.C. §1331], to have this right declared, and that [plaintiff] need not await a deportation order.

Id. at 383. The Court, however, affirmed the district court, on the merits. *Id.* at 385.

Most recently, in *Conti v. INS*, 780 F.2d 698 (7th Cir. 1985) during a §106(a) proceeding, the alien sought judicial review of a prior order of the district director. Denying direct review, the Seventh Circuit concluded: "If Ms. Conti wants to pursue her claim against the INS for rejecting her petition she must do so in the district court." *Id.* at 702.

CONCLUSION

For the foregoing reasons, Petitioner Hamid R. Kashani respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

September 10, 1986

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2960

HAMID R. KASHANI,

Plaintiff-Appellant,

v.

ALAN NELSON, IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

Appeal from an Order of the District Court
for the Southern District of Indiana.
No. IP83-1878C—**William E. Steckler**, *Judge.*

ARGUED DECEMBER 12, 1985—DECIDED JUNE 12, 1986

Before COFFEY, FLAUM, and RIPPLE, *Circuit Judges.*

COFFEY, *Circuit Judge.* The plaintiff appeals the district court's dismissal of his complaint seeking judicial review of the district director of Immigration and Naturalization Service's denial of his request for political asylum and for a preliminary injunction enjoining the Immigration and Naturalization Service from taking any further action to deport him from the United States. We affirm.

I.

The plaintiff, Hamid Kashani, an Iranian national, entered the United States on January 4, 1976 with non-immigrant student status pursuant to an "F-1" visa authorizing his

entry to attend the School of Engineering at Purdue University in Lafayette, Indiana. Kashani completed his studies on July 10, 1982 and on October 14, some three months later, filed a Request for Asylum with the District Director of the Immigration and Naturalization Service ("INS") pursuant to §208 of the Immigration and Nationality Act ("INA" or "Act"), 8 U.S.C. §1158(a). Section 208 provides that an alien may be granted asylum if he is a refugee within the meaning of §101(a)(42)(A) of the Act [8 U.S.C. §1101(a)(42)(A)], which defines a refugee as:

> "Any person who is outside any country of such person's nationality or, in the case of the person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ."

To establish a "well-founded fear of persecution," Kashani alleged in his application that he would be executed if he returned to Iran because of his activities in the now outlawed Rastakhiz Political Party, including his actions as an investigator for the Headquarters for Fighting Against Profiteering, a division of the party; his outspoken opposition to the Ayatollah Khomeni, the current leader of Iran, and the Ayatollah's National Secret Service; and his work as a journalist. Additionally, Kashani contended that he did not practice a religion or belong to a religious group and that the Iranian government, "is known to have mass murdered . . . those who allegedly do not adequately belong to a religious group."

On October 20, 1983, a year after Kashani filed his Asylum Request, the District Director denied the request because Kashani "failed to establish a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . ." On that same day, the District Director notified

Kashani that he was required to depart from the United States, at his own expense, on or before November 20, 1983.

On November 20, 1983, Kashani filed a "Verified Complaint for Judicial Review and Motion for Preliminary Injunction" in the United States District Court for the Southern District of Indiana alleging that the District Director abused her discretion in denying his asylum request and that she failed to consider relevant evidence and based her decision on non-relevant grounds. Kashani asked the district court to enjoin any further deportation proceedings and to grant his request for asylum. The district court dismissed the complaint, holding that "[a]n applicant for asylum does not have the right to appeal the District Director's decision in the district court." Kashani urges us to reverse the district court's determination that it does not have jurisdiction, arguing that since the District Director's denial is not made during a deportation proceeding, the denial does not fall within the Court of Appeal's exclusive jurisdiction over deportation orders and may be reviewed by the district court.

II.

Section 28 of the Immigration and Nationality Act, (8 U.S.C. §1158(a)), requires the Attorney General to:

> "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of Section 101(a)(42)(A) of this title."

The regulations implementing §208, 8 C.F.R. §208 *et seq.*, provide two procedures for applying for asylum. If the alien is not the subject of deportation proceedings (*i.e.* an alien seeking admission to the United States or an alien within the United States who has not been served with either a notice of referral to exclusion proceedings or an order

to show cause for departure), the alien may file an asylum application with the District Director. 8 C.F.R. §208.3(a). The District Director must request an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs ("BHRHA") of the Department of State, *id.* at §208.7, and if the District Director's decision is based in whole or in part on a BHRHA advisory opinion, the BHRHA advisory opinion will be made part of the record of proceedings unless it is classified. *Id.* at §208.8(d). If the BHRHA advisory opinion is included in the record, the applicant must be given an opportunity "to inspect, explain, and rebut the opinion. . . ." *Id.* Moreover, the applicant must be examined in person by an Immigration officer prior to the adjudication of the asylum application. *Id.* at §208.6. The applicant for asylum has the burden of proving that he is unable to return to his native country, "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at §208.5. Although the regulations specify six situations in which the District Director "shall" deny a request for asylum, *id.* at §208.9(f), they also provide that "[t]he District Director may approve or deny the asylum application in the exercise of his discretion," *id.* at §208.8(a), and, "no appeal shall lie from the decision of the District Director." *Id.* at (c). If the application is denied, the District Director, may in his discretion grant departure[1] or commence deportation proceedings. *Id.* at §208.8(f)(4).

If the alien is subject to deportation proceedings, he may file an asylum application with the Immigration court. *Id.* at §208.3(b). If the alien had previously filed an application for asylum with the District Director and the application

[1] The decision whether to grant voluntary departure is discretionary and may be made either by the District Director or by an Immigration Judge during deportation proceedings. *See* 8 C.F.R. §244.1 ("if the alien establishes that he/she is willing and has the immediate means with which to depart promptly from the United States, an immigration judge may authorize the alien to depart voluntarily from the United States in lieu of deportation. . . .")

was denied, the alien may renew his request for asylum before the Immigration Judge in the exclusion or deportation proceeding. *Id.* at §208.9. Thus, the regulatory scheme provides two opportunities to file asylum applications by allowing asylum applications to be presented to the District Director, and, if denied, to be renewed before the Immigration Judge in an ensuing deportation proceeding. *Jean v. Nelson*, 727 F.2d 959, 981 (11th Cir. 1984). The Immigration Judge must request a BHRHA advisory opinion unless an advisory opinion was previously issued in an application to the District Director and "circumstances have [not] changed so substantially since the first opinion was provided that a second referral would [not] materially aid in adjudicating the asylum request." *Id.* at §208.10(b). Unless classified, the BHRHA advisory opinion is made part of the record and the applicant must be given an opportunity to inspect, explain, and rebut it. *Id.* During the hearing, both the applicant and the INS may present additional evidence for the record, *id.* at §208.10(c), and the applicant carries the burden of proving "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* at §208.5. Although the regulations do not specify how the Immigration Judge is to make his decision concerning the asylum applicant, the Board of Immigration Appeals has indicated that "it will use the regulations addressed to the District Director as 'useful guidelines' in the exercise of the Board's own discretion over asylum requests." *Carvajol-Munoz v. INS*, 743 F.2d 562, 566 (7th Cir. 1984). If the Immigration Judge denies the asylum application, the exclusion or deportation proceedings "shall" be reinstituted. 8 C.F.R. §208.10(f). The Immigration Judge's denial of an asylum request may be appealed administratively to the Board of Immigration Appeals ("BIA") and, if denied, may be appealed to the Court of Appeals having jurisdiction along with the final order of deportation. *Carvajol-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984).

Judicial review of orders of deportation and exclusion are governed by 8 U.S.C. §1105a. The Court of Appeals

has exclusive jurisdiction to review "all final orders of deportation . . . made against aliens within the United States pursuant to administrative procedures under [8 U.S.C. §1252(b)]." *Id.* at §1105a(a). Section 1105a(c) requires aliens to exhaust their administrative remedies before seeking relief in the Court of Appeals:

> "An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order."

8 U.S.C. §1105a(c). With the exception of orders of deportation and exclusion, district courts have jurisdiction over all causes, civil and criminal, arising under subchapter 2 of the Immigration and Nationality Act. 8 U.S.C. §1329.

Kashani bases his argument that the district court has jurisdiction to review the merits of the district director's denial of an asylum application and to enjoin deportation proceedings on our decision in *Carvajol-Munoz* and the Eleventh Circuit decisions in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984)[2] and *Haitian Refugee Center v. Smith*,

[2] After the briefs in this case were filed, the Supreme Court held that in *Jean* that the Eleventh Circuit improperly reached the constitutional question of whether the Fifth Amendment applied to

(Footnote continued on following page)

676 F.2d 1023 (5th Cir. 1982) ("HRC")[3]. In *Carvajol-Munoz*, our court addressed the issue of whether the Immigration Judge's denial of an asylum application is reviewable in the court of appeals. Relying on *Foti v. INS*, 375 U.S. 217 (1963) and *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), we determined that an Immigration Judge's denial of an applicant's request for asylum made during a deportation proceeding was an "integral part" of the deportation proceeding and that review of the Immigration Judge's asylum denial would further 8 U.S.C. §1105a's goal of "preventing successive dilatory appeals to various federal courts." 743 F.2d at 567. We held that the Immigration Judge's denial of an applicant's request for asylum during a deportation proceeding could be reviewed by the court of appeals when appealed along with the deportation order. In passing, we noted our approval of the Fifth Circuit's decision in *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978), interpreting administrative regulations governing applications for asylum prior to the addition of the asylum provisions to the Act in the Refugee Act of 1980. The Fifth Circuit held that the District Director's denial of an asylum application was not reviewable by the court of appeals because the District Director's decision on the asylum application was not made during a deportation proceeding. 743 F.2d at 566-67. In *Jean* and *HRC*, the Eleventh Circuit addressed the question of whether the district court had jurisdiction to exercise its equitable powers to enjoin political asylum. The Eleventh Circuit concluded that Congress did not intend a "wholesale, carefully orchestrated program" by the INS to deny aliens their stat-

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[2] *continued*
consideration of admitted aliens for parole. *Jean v. Nelson*, 105 S.Ct. 2992 (1985). The Supreme Court's decision does not affect the outcome of this appeal. We discuss the opinion in *Jean* because Kashani misapplies the holding as supporting his argument that the district court has jurisdiction to review the district director's denial of applications for asylum in individual cases.

[3] Unit B of the Fifth Circuit became a part of the Eleventh Circuit. *See HRC*, 676 F.2d at 1023n.

utory and allegedly constitutional rights to petition for asylum[4] and that the existence of this statutorily guaranteed right to apply for asylum bars government officials from adopting policies that conflict with terms of the statute and the applicable regulations. *Jean*, 727 F.2d at 982-983; *HRC*, 676 F.2d at 1033-36. The Eleventh Circuit held that the district court had the authority under its federal question jurisdiction to enjoin a "pattern and practice" of immigration officials designed to violate the aliens' right to petition for asylum. *Jean*, 727 F.2d at 981-83; *HRC*, 676 F.2d at 1032-36.

Kashani's argument is based not only on our holding in *Carvajol-Munoz* that the District Director's denial of an asylum application is not reviewable in the court of appeals because it is not made during a deportation proceeding but also upon the Eleventh Circuit's finding of district court jurisdiction to enjoin the District Director from engaging in a "pattern and practice" of denying aliens their right to petition for asylum. Kashani reasons that since the District Director's denial is not made during a deportation proceeding, the district court has jurisdiction to review the merits of the District Director's denial of his asylum petition and to enjoin further deportation proceedings. The INS argues that the district court did not have jurisdiction to enjoin further deportation proceedings or to review the merits of the District Director's denial of Kashani's asylum petition because Congress never intended that district courts would review the merits of the District Director's denial; according to the INS, the alien must initially exhaust his administrative remedies with a renewal of his application for asylum in the ensuing de-

[4] The *HRC* panel's holding that excludable aliens have constitutional rights under the Fifth Amendment with regard to their applications for admissions, asylum, or parole within the United States was overruled by the *en banc* opinion in *Jean*. 727 F.2d at 976 n.27 and 982 n.34. The Supreme Court has held that the court improperly reached this constitutional issue. *Jean v. Nelson*, 105 S.Ct. 2992 (1985).

portation proceeding before attempting judicial review. The INS additionally argues that the political question doctrine precludes judicial review of the merits of the district director's denial.

Initially we address Kashani's argument that *Jean* and *HRC* stand for the proposition that the district courts have jurisdiction to review the merits of the district director's denial of asylum petitions and to enjoin further deportation proceedings. The Eleventh Circuit specifically held that it limited its jurisdictional holding to complaints alleging a "a pattern and practice" by Immigration officials to deny aliens their right to petition for asylum and pointedly refused to allow district court jurisdiction to review the District Director's denial in individual cases:

> "[I]nsofar as the first three counts set forth matters alleged to be part of a pattern and practice by Immigration officials to violate the constitutional rights of a class of aliens they constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction. Although a court of appeals may have sole jurisdiction to review alleged procedural irregularities in an individual deportation hearing *to the extent these irregularities may provide a basis for reversing an individual deportation order*, that is not to say that a program, pattern or scheme by Immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief. The distinction we draw is one between the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged.
>
> In concluding that the district court had jurisdiction over the first three counts, we wish to emphasize the

> factual uniqueness of this case. Our holding is not to be construed as permitting a constitutional challenge in the district court based on a procedural ruling in a deportation proceeding with which an alien is dissatisfied. We refuse to condone any such end-run around the administrative process. Casting as a constitutional violation an interlocutory procedural ruling by an immigration judge will not confer jurisdiction on the district court. Such a result would indeed defeat the congressional purpose behind the enactment of Section 106(a)—the elimination of dilatory tactics by aliens challenging deportation orders in piecemeal fashion. Congress resolved this problem by consolidating jurisdiction over challenges to final orders of deportation in one court, the court of appeals. We do not intend by our holding today to emasculate that solution. and given the narrowness of our holding, we do not expect such a result."

HRC, 676 F.2d at 1033 (emphasis in original) (footnotes omitted); *see also*, *Jean*, 727 F.2d at 980. Thus, as the Eleventh Circuit made explicit, *HRC* and *Jean* merely stand for the proposition that an agency's wholesale, carefully orchestrated program to deny statutorily guaranteed rights constitutes a wrong that is "independently cognizable in the district court under its federal question jurisdiction." *Jean*, 727 F.2d 980. *Jean* and *HRC* do not stand for the proposition that district courts have jurisdiction to review the merits of the denial in an *individual* case that does not allege a pattern and practice of immigration officials to deny statutorily-guaranteed rights.

We now turn to the INS' argument that Congress intended that aliens exhaust their administrative remedies by renewing their petitions for asylum in deportation proceedings, rather than seeking judicial review of the merits of the District Director's denial and injunctive relief in the district court. Kashani directs our attention to the presumption of reviewability embodied in the Administrative Procedure Act: any person "adversely affected or aggrieved" by agency action is entitled to "judicial review

thereof," as long as the action is a "final agency action for which there is no other adequate remedy in the act." 5 U.S.C. §§702, 704. The INS, on the other hand, urges us to rely on an exception to the presumption of reviewability, arguing that judicial review is not available when "statutes preclude judicial review." *Id.* at §701(a)(1). The procedure for determining whether a statute precludes judicial review recently was explained by the Supreme Court:

> "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.
>
> * * *
>
> The presumption favoring judicial review of administrative action is just that—a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent. The congressional intent necessary to overcome the presumption may also be inferred from contemporaneous judicial construction barring review and the congressional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute. [T]he presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole.
>
> * * *
>
> [T]he court has found the [clear and convincing evidence] standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' In the context of preclusion analysis, the 'clear and convincing evidence' standard is not a rigid evidentiary task but a useful reminder

> to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling."

Block v. Community Nutrition Institute, ___ U.S. ___, 104 S.Ct. 2450, 2454, 2456, 2457 (1984) (citations omitted). Thus, we must examine the judicial review and asylum provisions of the Immigration and Nationality Act to determine whether Congress intended to preclude judicial review of the District Director's denial of an individual alien's asylum petition.

An examination of the Act reveals that it is silent on the question of whether the merits of the district director's denial of an alien's asylum application may be reviewed in the district court. Accordingly, we turn to the legislative histories of the judicial review provision and the provision for asylum. Section 1105a, granting the court of appeals exclusive jurisdiction over orders of deportation and exclusion, was enacted "to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti v. INS*, 375 U.S. 217, 224 (1963).

> "Other aliens, mostly subversives, gangsters, immoral [persons], or narcotic peddlers, manage to protract their stay here indefinitely only because their ill-gotten gains permit them to procure the services of astute attorneys who know how to skillfully exploit the judicial process. Without any reflection upon the courts, it is undoubtedly now the fact that such tactics can prevent enforcement of the deportation provisions of the Immigration and Nationality Act by repetitive appeals to the busy and overworked courts with frivolous claims of impropriety in the deportation proceedings."

Foti, 375 U.S. at 225. Of particular concern was litigation arising out of discretionary determinations by the INS. *Id.* at 226. To eliminate delay and the opportunity

for employing dilatory tactics, Congress eliminated district court review of deportation and exclusion orders and granted exclusive jurisdiction to the court of appeals, subject to the certiorari jurisdiction of the Supreme Court, "to create a single, separate, statutory form of judicial review of administrative orders for the deportation of aliens." *Id.* at 225. Subsequent Supreme Court decisions construing §1105a held that Congress restricted the application of §1105a to "orders entered during proceedings conducted under §242(b) [8 U.S.C. §1252(b) (deportation proceedings)] or directly challenging deportation orders themselves." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 215 (1968); *INS v. Chadha*, ____ U.S. ____, 103 S.Ct. 2764, 2777 (1983). The term "final orders" under §1105a "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *Chadha*, 103 S.Ct. at 2777.

The INS argues, and we agree, that allowing district court review of the District Director's denial of applications for asylum and the granting of an injunction of further deportation proceedings would delay deportation proceedings and, contrary to Congressional intent would allow the sort of dilatory tactic that Congress sought to control and suppress when it enacted §1105a. The precise question of congressional intent we must answer, therefore, is whether Congress intended to abandon the §1105a goal of expediting deportation proceedings and consolidating review in the court of appeals when it ordered the attorney general to "establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum. . . ." 8 U.S.C. §1158(a). The asylum provision was added by the Refugee Act of 1980 ("Refugee Act"), Pub.L. 96-212, 94 Stat. 102. "The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the the United States [and] to eliminate the piecemeal approach to *admission* of refugees previously existing under §203(a)(7) and §212(d)(5)

of the Immigration and Nationality Act, and §108 of the regulations, and to establish a systematic scheme for admission and resettlement of refugees." *INS v. Stevic*, ____ U.S. ____, 104 S.Ct. 2489, 2498-99 (1984) (emphasis in original). Of particular concern to Congress was the Attorney General's use of his parole authority to admit refugees on an ad hoc basis. S.Rep.No. 256, 96th Cong., 2d Sess., 1, 2, 5, 17 (1980) (hereinafter S.Rep.), *reprinted in* 1980 U.S. Code Cong. & Adm. News 141, 142, 145, 157. Moreover, no specific statutory basis for asylum applications by aliens within the United States existed. *Stevic*, 104 S.Ct. at 2499 n.20; *Carvajol-Munoz*, 743 F.2d at 564 n.3. The Attorney General utilized his power to administer and enforce laws relating to immigration, 8 U.S.C. § 1103, to promulgate regulations allowing aliens to apply for asylum with the INS District Director. *Stevic*, 104 S.Ct. at 2499 n.20; *Carvajol-Munoz*, 743 F.2d at 564 n.3. The District Director could approve or deny the asylum application in the exercise of his discretion and the District Director's decision could not be administratively appealed. *Carvajol-Munoz*, 743 F.2d at 564 n.3. In 1979, the regulations were amended to give Immigration Judges and the Bureau of Immigration Appeals authority to consider applications for asylum made after the commencement or completion of deportation proceedings. *Stevic*, 104 S.Ct. at 2499 n.20; *Carvajol-Munoz*, 743 F.2d at 564 n.3. The Refugee Act provided the statutory authority for asylum applications by aliens within the United States and required "[t]he attorney general to establish a uniform procedure for passing upon an asylum application. The uniform procedure should include a provision allowing all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding, provided the order to show cause has not been issued." S.Rep. at 16, 1980 U.S.C.C.A.N. at 156.

Thus, our review of the legislative history of the Refugee Act reveals that Congress intended to establish a systematic scheme for admitting refugees but failed to reveal any evidence of congressional intent to allow review

of the District Director's denial of an asylum petition. Moreover, the regulatory scheme in effect at the time the Refugee Act was enacted, which was substantially the same as the present scheme, *see Stevic*, 104 S.Ct. at 2499 n.20, and *Carvajol-Munoz*, 743 F.2d at 564 n.3, furthered the §1105 a goal of expediting deportation proceedings and consolidating judicial review in the court of appeals. Section 1105a(c) provides that, "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies to him as a right under the Immigration laws and regulations." As the Supreme Court has noted, the requirement that administrative remedies must be exhausted before seeking judicial relief, like the requirement of finality, promotes both administrative and judicial efficiency:

> "A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals. Closely related to the above reasons is a notion peculiar to administrative law. The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction. As Professor Jaffe puts it, '[t]he exhaustion doctrine is, therefore, an expression of executive and ad-

> ministrative autonomy.' This reason is particularly pertinent where the function of the agency and the particular decision sought to be reviewed involve exercise of discretionary powers granted the agency by Congress, or require application of special expertise. * * * [J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise. In addition, other justifications for requiring exhaustion in cases of this sort have nothing to do with the dangers of interruption of the administrative process. Certain very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene. And notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors. Finally, it is possible that the frequent and deliberate flounting of administrative process could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

McKart v. United States, 395 U.S. 185, 194-5 (1969) (citation omitted). To determine whether requiring aliens to exhaust their administrative remedies would promote judicial and administrative efficiency, we turn to the regulations and compare the application procedure before the district director with the procedure before the Immigration Judge. Initially, we note that a more complete record is made in the proceeding before the Immigration Judge. Unlike the procedure before the Immigration Judge, the record developed before the District Director does not contain the BHRHA advisory opinion unless the District Director bases his decision in whole or in part on the advisory opinion and the alien does not have the right to challenge the advisory opinion unless it is part of the record. 8 C.F.R. §208.8(d). In the proceeding before the Immigration Judge, on the other hand, the BHRHA advisory opinion is automatically

included in the record unless it is confidential and the alien has the right to "inspect, explain and rebut it." *Id.* at §208.10(b). Moreover, the alien is given an opportunity to present additional evidence for the record. *Id.* at 208.10(c). It is clear to us from this comparison of the two procedures that the proceeding before the Immigration Judge develops the more extensive factual record for our review. Moreover, because the Immigration Judge's decision may be appealed to the Bureau of Immigration Appeals, the agency is afforded "a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. Thus, we hold that the goals of judicial and administrative efficiency are promoted in requiring an alien seeking asylum to exhaust his administrative remedies before seeking judicial relief.

In light of the overall statutory scheme, the judicial interpretation of the Act, and Congress' failure explicitly to provide for district court jurisdiction to review the District Director's denials of petitions for asylum and to enjoin further deportation proceedings, we hold that aliens may not seek district court review of the District Director's denial of their asylum petitions and injunction of deportation proceedings but must exhaust their administrative remedies by renewing the asylum petition in the ensuing deportation proceeding.

Indeed, we hasten to note that our holding is also supported by the political question ground urged on us by the INS. The political question doctrine, one of the principles of justiciability governing the jurisdiction of the federal courts, is based upon the separation of federal powers and will be invoked when any one of the following circumstances is present:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of

> a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. 186, 217 (1962).

The power to control the admission of foreigners is an inherent attribute of national sovereignty and the Supreme Court has long recognized that the political branches of the federal government possess concurrent authority to establish and implement substantive and procedural rules governing the admission of aliens to this country.[5] *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 654, 659 (1892); *Chae Chen Ping v. United States [The Chinese Exclusion Case]*, 130 U.S. 581, 609 (1889). Indeed, "[a]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations." *The Chinese Exclusion Case*, 130 U.S. at 606. The Supreme Court has repeatedly held that "[t]he power over aliens is of a political character and therefore subject only to narrow judicial review," *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 n.21 (1976); *Mathews v. Diaz*, 426 U.S. 67, 82 (1976) (narrow standard of judicial review applies to decisions 'made by the Congress or the President in the area of immigration'), and are "largely immune from judicial control." *Shaugnessy v. United States, ex rel. Mezei*, 345 U.S. 206, 210 (1953); *Harisiades v. Shaugnessy*, 342 U.S. 580, 589 (1952) (immigration matters are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

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[5] The Congressional authority over immigration has largely been delegated to the Attorney General, the member of the Executive branch with principal responsibility for immigration matters. 8 U.S.C. §1103(a).

An examination of the legislative history of the Refugee Act reveals that Congress wished to replace the ad hoc use of the parole authority, which was used to admit refugees, with more formal procedures so that it might expand Congress' role in the admission process and to provide for planning for the impact of refugees on local communities. S.Rep. at 5-13, 1980 U.S.C.C.A.N. at 145-53. The President was required to consult with Congress to establish "normal flow numbers" of refugees. S.Rep. at 5-8, 1980 U.S.C.C.A.N. at 145-58. Persons granted asylum are placed in a conditional admission status and are eligible for adjustment of status to lawful permanent resident after being physically present in the United States for at least one year after being granted asylum. 8 U.S.C. §1159(b). The Act allows the use of up to 5,000 of the "normal flow numbers" for the adjustment of the status of an alien granted asylum to that of lawful permanent resident. *Id.* Congress limited the numbers of refugees admitted yearly because of the impact of the refugees on the social welfare system: qualified refugees are eligible for cash assistance under a modified Aid to Families with Dependent Children Program; Medicaid; "day care, hygiene, family planning, cultural counseling, home management, transportation, housing improvement, ethnic skills, protective service for adults, life skills, vocation services and training, English as a second language training, job referral, nutrition, driver's education." S.Rep. at 11, 1980 U.S.C.C.A.N. at 151. Moreover, the right to petition the Director expires when the District Director initiates deportation proceedings by issuing an "order to show cause." *See* 8 C.F.R. §208.3(a). Thus, because the right to petition the District Director "expire[s] within a definite time limit," we agree with the Eleventh Circuit's determination that Congress regarded the right to petition the District Director as "a desirable but by no means essential part of the asylum process." *Jean*, 727 F.2d at 982. In effect, because the alien's right to petition for asylum may be exercised both before and during a deportation proceeding, the provision for petitioning the District Director merely affords the INS the opportunity to grant an

asylum request without invoking deportation proceedings. In sum, the District Director's decision whether to grant an asylum request involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the political branches of the government.

The decision of the district court is AFFIRMED.

RIPPLE, *Circuit Judge*, concurring. This case presents a very difficult issue of statutory interpretation. The court's opinion is a thorough and balanced examination of the question which correctly represents, on the basis of all available evidence, the intent of Congress. I write separately only because I have substantial reservations about the court's alternate treatment of the issue under the political question doctrine, a discussion which is unnecessary to the court's basic statutory analysis.

In my view, this litigation does not present an appropriate opportunity to declare definitively that the matter of asylum is "committed to the political branches of government." The full implications of such a statement are difficult to ascertain on this record. It is sufficient to say that the matter of political asylum, closely tied to the conduct of this country's foreign relations, is an area where the political branches have traditionally exercised great discretion and where we would expect Congress to be quite explicit if it intended that the judiciary play a role.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

INDIANAPOLIS DIVISION

HAMID R. KASHANI	)	
	)	
v.	)	IP 83-1878-C
	)	
ALAN NELSON, Commissioner, United States Department of Justice, Immigration and Naturalization Service	)	

ORDER OF SEPTEMBER 11th, 1984

This matter comes before the Court on defendant's motion to dismiss plaintiff's complaint pursuant to Fed.R. Civ. P. 12(b)(1) and 12(b)(6).

Plaintiff is an Iranian national who first entered the United States in 1976 to study at Purdue University. Plaintiff visited his homeland twice prior to the Islamic revolution, last returning to the United States on August 26, 1978. On October 14, 1982, plaintiff requested asylum in this country. The District Director of the Immigration and Naturalization Service (INS) denied plaintiff's request on October 20, 1983, on the ground that he had not demonstrated a well-founded fear of persecution by the current Iranian regime. Plaintiff thereafter filed with this Court a complaint for judicial review of the District Director's decision and for a preliminary injunction enjoining the INS from taking any

further action to deport the plaintiff from the United States.

Defendant has moved to dismiss plaintiff's complaint on the ground that plaintiff may not seek judicial review of the District Director's adverse decision in this Court or at this time. Instead, defendant argues that the proper course for plaintiff is to renew his request for asylum during deportation proceedings, 8 C.F.R. § 208.9. Plaintiff responds that a renewal of a request for asylum or a petition for withholding deportation are entirely separate remedies and that he is not required to exhaust the procedures of § 208.9 before challenging the District Director's decision on an asylum request made pursuant to 8 C.F.R. § 208.1 to § 208.8.

The Court concludes that an applicant for asylum does not have the right to appeal the District Director's decision in the district courts. This result is dictated by the clear language of 8 C.F.R. § 208.8(c) which provides: "Appeal. No appeal shall lie from the decision of the district director." In Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983), the Court identified a written decision of the District Director as one of the five steps in the asylum procedure and noted it was a step "which may not be appealed." 708 F.2d at 873.

An alien seeking asylum is not left without protection, however, as the District Director's denial of asylum will call into play exclusion or deportation proceedings. During these proceedings the alien may renew his request for asylum before an immigration judge. 8 C.F.R. § 208.9, § 208.10. All actions taken in the course of deportation proceedings are ultimately reviewable by the appropriate United States Court of Appeals. 8 U.S.C. § 1105(a). With these procedural measures in place the Court cannot conclude that Congress also intended to permit asylum applicants to be able to first appeal to the district courts. The impact of such a right on the district courts would be potentially enormous.

By reason of the foregoing defendant's motion to dismiss is hereby GRANTED.

IT IS SO ORDERED.

Dated this 11th day of September, 1984.

William E. Steckler

United States District Judge

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinos 60604

June 12, 19 86.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

HAMID R. KASHANI,
Plaintiff-Appellant,

No. 84-2960 vs.

ALAN NELSON, Commissioner, United States Department of Justice, Immigration and Naturalization Service,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83 C 1878
Judge William E. Steckler

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX-B
STATUTES & REGULATIONS

28 U.S.C. §1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Immigration and Nationality Act (INA) §279,

8 U.S.C. §1329. Jurisdiction of district courts

The district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [INA §§201-293, 8 U.S.C. §§1151-1363 (1982)]. It shall be the duty of the United States attorney of the proper district to prosecute every such suit when brought by the United States. Notwithstanding any other law, such prosecutions or suits may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under section 1325 or 1326 of this title may be apprehended. No suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.

INA §208(a), 8 U.S.C. §1158(a). Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

INA §106(a), 8 U.S.C. §1105a(a).

Judicial review of orders of deportation and exclusion.

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title [INA §242(b)] or comparable provisions of any prior Act, ...

8 C.F.R. §208.1 (1986). Jurisdiction.

(a) Jurisdiction over any application for asylum made by an applicant for admission at a port of entry lies with the district director having jurisdiction over that port of entry. Initial jurisdiction over any application for asylum made by an alien in the United States lies with the district director having jurisdiction over the application's [*sic.*] place of residence.

(b) Exclusive jurisdiction over an asylum application filed but [*sic.*] an alien who has been served a notice of referral to exclusion proceedings under §236.3 of this chapter, or served an order to show cause under §242.1 of this chapter, lies with the immigration judge. Except upon the motion of the district director, an immigration judge shall not remand an application or terminate a proceeding on the ground that the district director has failed to adjudicate an asylum application filed, or allegedly filed, prior to the issuance of the order to show cause or the notice to appear for exclusion proceedings. Any previously filed but unadjudicated asylum application must be resubmitted by the alien to the immigration judge.

8 C.F.R. §208.8(a)-(c) (1986). Decision by the district director.

(a) *Discretion.* The district director may approve or deny the asylum application in the exercise of discretion.

(b) *Writing.* The decision of the district director shall be in writing.

(c) *Appeal.* No appeal shall lie from the decision of the district director.

Supreme Court, U.S.
FILED
NOV 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-405

In the Supreme Court of the United States

OCTOBER TERM, 1986

HAMID R. KASHANI, PETITIONER

v.

ALAN C. NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a deportable alien, before seeking judicial review of an administrative denial of his asylum claim, must first exhaust his administrative remedies by renewing that claim in deportation proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-405

HAMID R. KASHANI, PETITIONER

v.

ALAN C. NELSON, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 793 F.2d 818. The order of the district court dismissing petitioner's complaint (Pet. App. 21a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1986. The petition for a writ of certiorari was filed on September 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered the United States on January 4, 1976, on a nonimmigrant student visa (F-1) authorizing him to study at Purdue University. Petitioner's authorized stay in the United States ended on July 10, 1982, but petitioner remained in this country unlawfully.[1] On October 14, 1982, petitioner filed an application for asylum with a district director of the Immigration and Naturalization Service (INS), as permitted by 8 C.F.R. 208.3(a)(2). The application was denied on October 20, 1983, because petitioner did not establish a well-founded fear of persecution under the provisions of 8 U.S.C. 1158. In lieu of instituting deportation proceedings, the district director, pursuant to 8 C.F.R. 208.8(f)(4), granted petitioner the privilege of voluntary departure from the United States by November 20, 1983. Pet. App. 1a-3a.

Petitioner did not voluntarily depart from the United States by November 20, 1983. Instead, on

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[1] One who enters the United States on a student visa and then stays beyond the time authorized is "in the United States in violation of [the Immigration and Nationality] Act" (8 U.S.C. 1251(a)(2)), would commonly be referred to as an "illegal alien," and is deportable under both 8 U.S.C. 1251(a)(2) and 8 U.S.C. 1251(a)(9). See, *e.g.*, T. Aleinikoff & D. Martin, *Immigration Process and Policy* 376 & n.30 (1985). Petitioner therefore errs in suggesting that he was lawfully in this country until the district director declared otherwise (Pet. 15).

We note that petitioner's unlawful presence in this country began after January 1, 1982. Petitioner therefore is not eligible for legalization of his status under Section 245A(a)(2)(A) and (B) of the Immigration and Nationality Act, added by Section 201 of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 (Nov. 6, 1986) (*reprinted in* 132 Cong. Rec. H10076 (daily ed. Oct. 14, 1986)).

that date, he filed an action in the district court seeking injunctive relief against INS's commencing deportation proceedings, and for judicial review of the district director's denial of his asylum claim. The complaint alleged that the district director abused her discretion by failing to consider the relevant evidence submitted in support of his asylum claim. On September 11, 1984, the district court dismissed the complaint, holding that an applicant for asylum must renew his request for asylum in deportation or exclusion proceedings before seeking judicial review, which lies in court of appeals under 8 U.S.C. 1105a (Pet. App. 23a).

On September 24, 1984, the district director issued an order to show cause why petitioner should not be deported. On November 9, 1984, petitioner appealed the district court's order.

The court of appeals affirmed. After an exhaustive review of the statutory scheme, it concluded that Congress did not intend to permit judicial review before a deportable alien exhausted his administrative remedies by renewing his asylum application in deportation proceedings (Pet. App. 17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 105, added a new Section 208, 8 U.S.C. 1158, to the Immigration and Nationality Act of 1952 (the Act). Section 208(a) directs the Attorney General to "establish a procedure for an alien physically present in the United States or

at a land border or port of entry, irrespective of such alien's status, to apply for asylum." [2]

The asylum procedure established by the Attorney General is contained in 8 C.F.R. Pt. 208 and is correctly summarized in *Yiu Sing Chun* v. *Sava*, 708 F.2d 869, 873 (2d Cir. 1983) (footnotes omitted): "There are five steps in the asylum procedure: preparation and filing of the application for asylum, examination in person by an immigration officer or judge, an advisory opinion from BHRHA [the State Department's Bureau of Human Rights and Humanitarian Affairs], a written decision of the District Director, which may not be appealed, and renewal of the denied asylum request before an immigration judge in exclusion or deportation proceedings."

Petitioner contends that he may secure judicial review of a denial of asylum after the first four steps of this procedure, without undergoing the fifth step. No decision of any court supports that result.

2. Petitioner seeks support for his argument in this Court's decisions in *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968), and *INS.* v. *Stanisic*, 395 U.S. 62 (1969) (Pet. 3-7). Neither case, however, involved an application for asylum under the Section 208 procedures, and neither case involved any question at all of exhaustion of administrative remedies. In *Cheng Fan Kwok*, the Court held that the district

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[2] Section 208(a) goes on to state that "an alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." Petitioner is therefore quite wrong to assert that "refugee status * * * has nothing to do with an asylum application which is decided under the INA § 208(a), 8 U.S.C. § 1158(a)" (Pet. 7). See also *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

court rather than the court of appeals had initial jurisdiction to review a district director's denial of a stay of deportation *after* deportation proceedings had been concluded. There was no contention in the case that the denial of the stay of deportation was unreviewable because of a failure to exhaust administrative remedies; the only jurisdictional dispute was whether the district court or court of appeals should hear the case in the first instance.

In *Stanisic*, there was again no assertion that the alien, who had been denied "asylum" [3] by the district director, had failed to exhaust his administrative remedies. Indeed, the issue in the case was whether, under statutes and regulations then in effect, the alien was entitled to an administrative remedy that he had sought and had been denied. Petitioner, by contrast, has not sought the administrative remedy of a grant of asylum by the immigration judge in deportation proceedings, an administrative remedy that is indisputably available to him (8 C.F.R. 208.9). The Court's statement in *Stanisic* that the district court had jurisdiction (395 U.S. at 68 n.6), like the holding in *Cheng Fan Kwok*, indicates only which of two possible courts had initial jurisdiction over a controversy that everyone agreed was justiciable. It has nothing whatsoever to do with petitioner's

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[3] What the Court termed "political asylum" in *Stanisic* (395 U.S. at 70) was in fact relief from deportation under either Section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5), or Section 243(h) of the Act, 8 U.S.C. 1253(h) (395 U.S. at 70). What is now called "asylum," and specifically so labeled in 8 U.S.C. 1158, is a different (and greater) form of relief, obtained through the procedures established after passage of the Refugee Act of 1980. See generally *INS* v. *Stevic, supra; Cardoza-Fonseca* v. *INS*, 767 F.2d 1448 (9th Cir. 1985), cert. granted, No. 85-782 (Feb. 24, 1986).

claim that his asylum request is justiciable in advance of his exhaustion of administrative remedies.

3. Petitioner also claims that the decision below conflicts with decisions of several other circuits (Pet. 8-13). Each case on which petitioner relies is entirely consistent with the decision below.

In *Salehi* v. *District Director, INS*, 796 F.2d 1286 (10th Cir. 1986), the issue yet again was which of two courts had initial jurisdiction over the controversy, and not whether the aliens had exhausted necessary administrative remedies. Unlike petitioner, the aliens in *Salehi* had long since concluded deportation proceedings (796 F.2d at 1287), and, as in *Cheng Fan Kwok*, they sought relief from actions of the district director taken *after* a deportation order was entered. The decision says nothing about the ability of a deportable alien to seek judicial review of a district director's denial of asylum *before* undergoing deportation proceedings.

In *Yiu Sing Chun* v. *Sava*, *supra*, the aliens' asylum applications were denied by district directors, and they sought an exclusion hearing before an immigration judge, so as to renew their applications under 8 C.F.R. 208.9. INS denied their request for an exclusion hearing notwithstanding 8 C.F.R. 208.9 on the ground that, as stowaways, they were denied the right to such a hearing by 8 U.S.C. 1323(d). When the aliens sought habeas corpus in the district court, the government obviously could not and did not contend that the aliens had failed to exhaust the administrative remedy of renewing their applications before an immigration judge, for the government contended that they had no such remedy. The district court, agreeing with the government, proceeded to

review the district directors' decisions on the merits.[4] The court of appeals, holding that the aliens were entitled to an exclusion hearing at which they could renew their asylum claims (708 F.2d at 874-875), remanded for further *administrative* proceedings (*id.* at 877). Because it held that the aliens had a right to renew their applications before an immigration judge, the court explicitly declined to resolve "the substantive question whether petitioners are in fact entitled to be treated as asylees" (*id.* at 876). The decision, therefore, is precisely in line with the holding in this case that a court should await the immigration judge's decision before reviewing a denial of asylum on the merits.

Stanisic v. *INS*, 393 F.2d 539 (9th Cir. 1968), as explained above in the discussion of *INS* v. *Stanisic*, 395 U.S. 62 (1969), did not involve an application

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[4] The district court, in a holding that was neither endorsed nor rejected by the court of appeals, disagreed with the government's argument that it lacked jurisdiction to review the district directors' claims on the merits. The government's argument was not, however, that the aliens had failed to exhaust administrative remedies. See *Yiu Sing Chun* v. *Sava*, 550 F. Supp. 90, 92-93 (E.D.N.Y. 1982). The district court's decision therefore provides no support for petitioner's assertion that a court may review the merits of an asylum determination before the alien exhausts his administrative remedies. In addition, the district court's assertion of jurisdiction was based on the theory that the aliens in that case were entitled to seek habeas corpus under Section 106(b) of the Act, 8 U.S.C. 1105a(b). 550 F. Supp. at 93. Section 106(b) applies only to aliens who are being *excluded* from the country before entry, not to aliens like petitioner who are subject to deportation from the country after entry. Accordingly, whatever the merits of the district court's theory, it rested on a statutory basis that does not apply to petitioner.

for asylum under the Section 208 procedures, which did not then exist. It also did not involve any contention that the alien had failed to exhaust his administrative remedies.

The next three cases on which petitioner relies were all challenges to denials of asylum under the pre-Refugee Act regulations found in 8 C.F.R. Pt. 108 (1980). See *Medina* v. *Castillo*, 627 F.2d 972, 973 nn.1 & 2 (9th Cir. 1980); *Fleurinor* v. *INS*, 585 F.2d 129, 134 (5th Cir. 1978); *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023, 1026 n.1, 1027 n.6 (5th Cir. 1982). Under those regulations, an alien could seek asylum *only* from the district director and could not renew his application in deportation or exclusion proceedings. The alien did, however, have a right to seek withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), in a subsequent deportation proceeding notwithstanding prior rejection of his asylum claim by a district director (see *INS* v. *Stevic*, 467 U.S. at 420-421).

In *Medina* and *Fleurinor*, the government did not argue that the right to seek withholding of deportation (a lesser benefit than asylum) in his deportation proceeding meant that the alien must undergo that proceeding before seeking judicial review. The courts accordingly found direct judicial review of a district director's asylum determination to be proper. In *Haitian Refugee Center*, the government did argue that the aliens were required to exhaust their administrative remedy by seeking withholding before they could obtain judicial review of asylum claims, and the court, for purposes of its decision, agreed: "When the correctness of an asylum denial is at issue, * * * the policy of securing more complete development of the factual record is advanced by re-

quiring the alien to seek withholding * * *" (676 F.2d at 1036). The court distinguished that principle, however, by noting that in that case "the [aliens] [we]re testing only the legality of the procedures used" (*ibid.*). Although the aliens had administrative remedies available insofar as they sought a determination on the merits that they had a well-founded fear of persecution, they had no administrative procedures to exhaust insofar as they challenged the procedure used by the district director (*ibid.*) That holding of *Haitian Refugee Center*, of course, is of no assistance to petitioner, who seeks to challenge his denial of asylum on the merits.

If, as the government contended and the court suggested in *Haitian Refugee Center*, an alien seeking review on the merits was required to undergo deportation proceedings before seeking judicial review, it follows a fortiori that exhaustion is required under the present regulatory scheme, which explicitly allows an alien to renew his asylum claim in deportation proceedings (8 C.F.R. 208.9). If, as suggested by *Medina* and *Fleurinor*, review of an asylum determination on the merits could be obtained in advance of a deportation proceeding, it was because then—unlike now—an alien could not seek in the deportation proceeding the same benefit, asylum, that he could seek from the district director. No matter what the correct exhaustion rule was under the pre-Refugee Act regulations, these cases provide no support for petitioner's contention that exhaustion is not required under the current regulations.

Finally, in *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc), aff'd on other grounds, No. 84-5240 (June 26, 1985), there was no challenge to the merits of any asylum determination. The court did nothing

more than follow *Haitian Refugee Center* in holding that "the existence of unexhausted administrative remedies * * * applicable to an alien's opportunity to apply for asylum before the immigration judge * * * cannot justify invoking the exhaustion doctrine with respect to a challenge to the *procedure* before the district director" (727 F.2d at 981 (emphasis added)). Since petitioner is challenging the merits of the district director's determination that he is ineligible for asylum, and not the procedure used, *Jean* does not support his claim that he need not exhaust administrative remedies.

In sum, no court of appeals has ever held, or even suggested, that under the *current* asylum regulations a deportable alien may obtain judicial review of the merits of a district director's asylum determination before the alien exhausts his administrative remedies by renewing his application for asylum before an immigration judge in deportation proceedings.[5]

4. Aside from his erroneous interpretation of decisions of this Court and the courts of appeals, petitioner appears to offer two arguments in support of his claim that he should be excused from exhaustion of administrative remedies. First, he contends that the delay in eligibility for citizenship that might ensue from exhaustion warrants excusal from the requirement (Pet. 4-5). Imposition of an exhaustion requirement, however, always carries with it the potential for delay of the benefit sought (if the ap-

[5] In addition to his claim of a conflict in the circuits, petitioner claims that there is an intracircuit conflict in the Seventh Circuit (Pet. 16). Such a conflict would be of concern to that court, not this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957). In any case, there is no conflict; none of the cited Seventh Circuit cases involved an asylum claim.

plicant does not succeed in the further administrative proceedings). That potential delay provides no greater reason to excuse asylum applicants from exhaustion of administrative remedies than to do so for anyone else.[6] Indeed, exhaustion of administrative remedies in this context carries with it not just the potential for delay of benefits, but also the certainty of delay of deportation. For deportable aliens who are not in custody, such as petitioner, that delay is quite valuable.

Second, petitioner appears to argue that because the immigration judge and Board of Immigration Appeals will not "review" the district director's asylum determination, that determination should be subject to judicial review (Pet. 5; see also *id.* at 13-15).[7] If petitioner is indeed so arguing, his contention is precisely backwards. The fact that petitioner will receive a de novo hearing on his asylum claim before the immigration judge, rather than a hearing to review the district director's determination of in-

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[6] Petitioner erroneously suggests (Pet. 5) that footnotes in this Court's opinion, the lower court's opinion, and our jurisdictional statement in *INS* v. *Chadha*, 426 U.S. 919 (1983), indicate that possible delay in obtaining immigration benefits is a sufficient reason to excuse exhaustion of administrative remedies. The cited footnotes indicate only that, because Chadha might become eligible for citizenship earlier if he prevailed in the court case than if he were granted citizenship on the basis of his recent marriage to an American citizen, his case was not moot.

[7] It is not clear that petitioner is in fact making this argument, since the parts of his petition in which it might be found discuss district directors' decisions in general rather than focusing on asylum denials. This case, of course, involves asylum denials and not the myriad other decisions made by district directors.

eligibility for asylum, is more reason, not less, to require him to undergo that hearing before coming to court.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

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[8] In addition to holding that petitioner must exhaust his administrative remedies, the court of appeals suggested that a district director's decision to grant or deny asylum is unreviewable under the political question doctrine (Pet. App. 17a-20a). It would be inappropriate to grant certiorari in order to review that suggestion, whatever its merits, since the judgment of the court of appeals is independently supported by its correct holding that petitioner was required to exhaust administrative remedies.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40079

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-405

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

HAMID R. KASHANI, *Petitioner*,
v.
ALAN C. NELSON, Commissioner of the Immigration and Naturalization Service, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

December 3, 1986

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

REPLY ARGUMENT

A. UNDER THE ADMINISTRATIVE PROCEDURE ACT, A DISTRICT DIRECTOR'S ASYLUM DENIAL IS JUDICIALLY REVIEWABLE.

The Administrative Procedure Act (APA) defines administrative decisions subject to judicial review:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise

> final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

APA § 10(c), 5 U.S.C. § 704. Thus, under the APA, a district director's asylum denial is reviewable, because:

1. Under the APA, the district director's asylum denial is a final action. Commissioner's own regulation attests to this: "Appeal. No appeal shall lie from the decision of the district director [denying asylum]." 8 C.F.R. § 208.8(c) (1986); Haitian Refugee Center (H.R.C.) v. Civiletti, 503 F. Supp. 442, 467 (S.D. Fla. 1980), aff'd as modified sub nom. H.R.C. v. Smith, 676 F.2d 1023 (5th Cir. 1982).

2. Even if a district director's asylum denial is not a final action, it is still judicially reviewable because it cannot be raised on review of a later agency action. The prior decision of a district director would not be directly reviewable on judicial review of a deportation proceeding. Gornicka v. INS, 681 F.2d 501, 503 (7th Cir. 1982). Thus, the district director's

asylum denial is reviewable by a district court, since it "cannot be raised upon judicial review of later order of agency." Borden, Inc. v. Federal Trade Comm'n., 495 F.2d 785, 787 (7th Cir. 1974).

3. Further, a district director's asylum denial is judicially reviewable because it cannot be appealed to a "superior agency authority." Also, there are no INS regulations requiring that the adverse effects of a district director's asylum denial be withheld for any period— nor does Commissioner cite any. In fact, the INS does not hold "inoperative" the adverse effects of the district director's denial, even if the alien eventually renews his asylum application with an immigration judge and even if the immigration judge actually grants him asylum. See Pet. at 4-5.

B. SINCE THE ENACTMENT OF THE REFUGEE ACT OF 1980, DISTRICT COURTS HAVE JURISDICTION, UNDER INA § 279, TO REVIEW DISTRICT DIRECTORS' ASYLUM DENIALS.

Section 279 of the INA, 8 U.S.C. § 1329 (1982), vests the district courts with jurisdiction to review questions arising under the second subchapter (title II)

of the INA, i.e. INA §§ 201-293, 8 U.S.C. §§ 1151-1363. Prior to 1980, asylum applications were made and decided under INA § 103, 8 U.S.C. § 1103, which is a part of the first subchapter (title I) of the INA. Thus, in Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 764 (S.D. N.Y. 1979), the Court held that it lacked jurisdiction to review the district director's asylum denial. In 1980, Congress changed this situation, when it enacted the Refugee Act of 1980, codified in part at INA § 208, 8 U.S.C. § 1158 (1982) (Asylum procedure), as a part of the second subchapter (title II) of the INA.

> Whatever complications holdings like Chen Chaun-Fa may introduce upon occasion, most immigration disputes do arise under title II of the INA. Thus, most of the time a plaintiff seeking relief in the district court will have little difficulty invoking jurisdiction under either § 279 or 28 U.S.C.A. § 1331- or both- provided only that she is not directly challenging an exclusion or deportation order, for which § 106 unambiguously provides exclusive review channels.

T. Aleinikoff and D. Martin, Immigration Process and Policy 589 (1985).

Commissioner cites H.R.C. for the proposition that when the merits of a district director's asylum denial

are at issue, the alien must first seek withholding of deportation before an immigration judge. Opposition Brief at 8-9. The quotation in Commissioner's brief is really a discussion of Chen Chaun-Fa. In fact, the Fifth Circuit doubted the wisdom of Chen Chaun-Fa: "However wise or correct requiring exhaustion of the optional § 1253(h) remedy may be when an alien seeks a review on the merits of the asylum determination, the instant case, in which it has been found that the procedures employed frustrated any merits determinations, is distinguishable, and we refuse to mandate exhaustion of the optional remedy." H.R.C., 676 F.2d at 1035-36. Whatever the wisdom of Chen Chaun-Fa might have been when it was decided, today it has no significance— because of the 1980 enactment of INA § 208, 8 U.S.C. 1158, as a part of the second subchapter of INA.

C. THE DECISION OF THE SEVENTH CIRCUIT, BELOW, CANNOT BE RECONCILED WITH THE PRIOR DECISIONS OF THIS COURT.

Commissioner argues that Cheng Fan Kwok v. INS, 392 U.S. 206 (1968), and INS v. Stanisic, 395 U.S. 62, 68

n.6 (1969), are no longer good law because of the Refugee Act of 1980. Opposition Brief at 4. Commissioner's argument is without merit, because there are no provisions in the Refugee Act of 1980 which contradict the prior decisions of this Court— and Commissioner does not cite any. These cases are still good law and cannot be reconciled with the decision below.

D. THE SEVENTH CIRCUIT'S DECISION, BELOW, CANNOT BE RECONCILED WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS.

1. Commissioner makes much of the fact that in Cheng Fan Kwok, and Salehi v. District Director, INS, 796 F.2d 1286 (10th Cir. 1986), aliens brought their complaint to a district court after their deportation proceedings were completed. Opposition Brief at 6. A district director's decision does not become any more justiciable by haling the alien into a deportation proceeding, because Commissioner's own regulation prohibits the immigration judges, as well as the Board of Immigration Appeals (BIA), from reviewing a district director's decisions. H.R.C., 676 F.2d at 1035

("[I]mmigration judges and the BIA have no authority to review actions of the district director.").

2. Commissioner tries to distinguish Yiu Sing Chun v. Sava, 708 F.2d 869 (2d Cir. 1983), claiming that there the district court's jurisdiction was based upon INA § 106(b), 8 U.S.C. § 1105a(b), which authorizes habeas corpus actions brought in district courts for review of final exclusion orders, a situation not present in the instant case. Opposition Brief at 7 n.4. However, INA § 106(b), only authorizes judicial review of final exclusion orders entered in the course of exclusion proceedings conducted under INA § 236, 8 U.S.C. § 1226. Thus, a district court's jurisdiction to review the separate decisions of the district directors must— and in Yiu Sing Chun did— flow from its own independent sources, such as 8 U.S.C. § 1329 or 28 U.S.C. § 1331.

3. With respect to H.R.C., Medina v. Castillo, 627 F.2d 972 (9th Cir. 1980), and Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978), Commissioner's assertion that, under the then-prevailing regulations, an alien "could not renew his application in deportation or exclusion proceedings" is untrue. See Opposition Brief at 8. The

regulations actually required:

> Under the regulations in force during the time period at issue in this lawsuit, the plaintiffs had a right to have their asylum applications considered by the District Director, whose decision was unreviewable within INS. 8 C.F.R. §§ 108.1 & 108.2. A District Director's denial of asylum would not preclude the alien from applying for asylum during the course of a later deportation hearing before an immigration judge. 8 C.F.R. § 108.2.

H.R.C., 503 F. Supp. at 463-64 (emphasis added).

4. Commissioner also tries to distinguish H.R.C. and Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), aff'd, ___ U.S. ___, 105 S. Ct. 2992 (1985), noting that in those cases aliens complained of the district director's asylum denial on procedural grounds, whereas here Kashani's complaint is on the merits. Opposition Brief at 9. Commissioner's distinction between review of procedural infirmities and review on the merits only relates to the question of in which court the asylum decisions of the immigration judges may be reviewed. In H.R.C. and Jean, the Courts held that when procedural infirmities during the deportation proceedings reveal a "pattern of practice," the aliens may seek judicial

review in a district court. See Pet. at 10-12. Commissioner's distinction, thus, is inapplicable when review of a district director's decision is sought.

E. INTRACIRCUIT CONFLICTS ARE IMPORTANT FACTORS IN DECIDING WHETHER TO GRANT CERTIORARI.

Intracircuit conflicts, see Pet. at 16, are important factors in deciding whether to grant certiorari. Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (granting certiorari "because of this intracircuit conflict"); John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939) (granting certiorari due to intracircuit conflict and significance of the question).

CONCLUSION

For the foregoing reasons, Petitioner Hamid R. Kashani respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

December 3, 1986

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